

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY DEMETRIS IRBY,

No. 2:21-cv-1047-TLN-EFB P

Plaintiff,

## ORDER

THORNTON, et al.,

### Defendants.

Plaintiff is county jail inmate proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint (ECF No. 1), he has filed an application to proceed in forma pauperis (ECF Nos. 2 & 7). As discussed below, the court will grant his application to proceed in forma pauperis and screen his complaint.

Application to Proceed In Forma Pauperis

The court has reviewed plaintiff's application (ECF No. 2) and finds that it makes the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

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## Screening

## I. Legal Standards

3       Federal courts must engage in a preliminary screening of cases in which prisoners seek  
4 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
5 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion  
6 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which  
7 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
8 relief.” *Id.* § 1915A(b).

A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)). While the complaint must comply with the “short and plain statement” requirements of Rule 8, its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

To avoid dismissal for failure to state a claim a complaint must contain more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at 678.

Furthermore, a claim upon which the court can grant relief must have facial plausibility. *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v. Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

1           II.       Analysis

2           Plaintiff's complaint states a potentially viable claim of excessive force against defendant  
3 correctional officer Thornton. *See* ECF No. 1 at 4 (alleging that on February 14, 2021, while  
4 plaintiff was "subdued and/or restrained," Thornton banged plaintiff's head on the ground, struck  
5 plaintiff with his fists, and dug his knees into plaintiff's neck and back, causing plaintiff to suffer  
6 physical, psychological, and emotional injuries).

7           The complaint also identifies the Solano County Sheriff's Office, Solano County, and the  
8 State of California as defendants. Claims against these defendants cannot proceed. If plaintiff  
9 wishes to pursue a claim against the Sheriff's Office and/or Solano County, he must demonstrate  
10 that he suffered an injury caused by employees acting pursuant to the municipality's policy or  
11 custom. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977); *Monell v. New*  
12 *York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Villegas v. Gilroy Garlic Festival Ass'n*,  
13 541 F.3d 950, 964 (9th Cir. 2008). Here, plaintiff has neither identified a particular County  
14 policy, nor alleged harm caused by such a policy. Furthermore, the State of California is not a  
15 "person" within the meaning of § 1983 and is immune from suit under the Eleventh Amendment.  
16 *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *see also Hafer v. Melo*, 502 U.S.  
17 21, 30 (1991) (clarifying that Eleventh Amendment does not bar suits against state officials sued  
18 in their individual capacities, nor does it bar suits for prospective injunctive relief against state  
19 officials sued in their official capacities).

20           For these reasons, plaintiff may either proceed only on the potentially cognizable  
21 excessive force claim against defendant Thornton or he may amend his complaint to attempt to  
22 cure the complaint's deficiencies. Plaintiff is not obligated to amend his complaint.

23           Leave to Amend

24           Plaintiff may file an amended complaint to attempt to cure the deficiencies noted above.  
25 Any amended complaint must identify as a defendant only persons who personally participated in  
26 a substantial way in depriving him of a federal constitutional right. *Johnson v. Duffy*, 588 F.2d  
27 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a constitutional right if  
28 ////)

1 he does an act, participates in another's act or omits to perform an act he is legally required to do  
2 that causes the alleged deprivation). Plaintiff is not obligated to file an amended complaint.

3 Plaintiff may not change the nature of this suit by alleging new, unrelated claims in the  
4 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

5 Any amended complaint must be written or typed so that it so that it is complete in itself  
6 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
7 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
8 earlier filed complaint no longer serves any function in the case. See *Forsyth v. Humana*, 114  
9 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter  
10 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
11 1967)).

12 The court cautions plaintiff that failure to comply with the Federal Rules of Civil  
13 Procedure, this court’s Local Rules, or any court order may result in this action being dismissed.  
14 See E.D. Cal. L.R. 110.

15 Conclusion

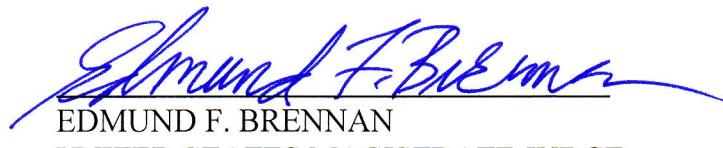
16 Accordingly, it is ORDERED that:

- 17 1. Plaintiff’s application to proceed in forma pauperis (ECF Nos. 2 & 7) is granted.
- 18 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected  
19 in accordance with the notice to the Solano County Sheriff filed concurrently  
20 herewith.
- 21 3. Plaintiff’s complaint alleges, for screening purposes, a potentially cognizable  
22 excessive force claim against defendant Thornton.
- 23 4. All other claims, including those against defendants Solano County Sheriff’s  
24 Office, Solano County, and the State of California, are dismissed with leave to  
25 amend within 30 days of service of this order. Plaintiff is not obligated to amend  
26 his complaint.
- 27 5. Within thirty days plaintiff shall return the notice below advising the court whether  
28 he elects to proceed with the cognizable claim or file an amended complaint. If

1           the former option is selected and returned, the court will enter an order directing  
2           service at that time.

- 3         6. Failure to comply with any part of this this order may result in dismissal of this  
4           action.

5         Dated: September 7, 2021.



6           EDMUND F. BRENNAN  
7           UNITED STATES MAGISTRATE JUDGE  
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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY DEMETRIS IRBY,

No. 2:21-cv-1047-TLN-EFB P

Plaintiff,

NOTICE

v.

THORNTON, et al.,

Defendants.

In accordance with the court's Screening Order, plaintiff hereby elects to:

(1) \_\_\_\_\_ proceed only with the excessive force claim against defendant Thornton;

OR

(2) \_\_\_\_\_ delay serving any defendant and file an amended complaint.

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Plaintiff

Dated: